PE Labellers & CFT Pacific Sdn Bhd & Anor v CFT SPA & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-450–08 OF 2019
WAN MUHAMMAD AMIN JC
18 JANUARY 2021

Civil Procedure — Injunction — Jurisdiction to grant — Whether High Court had jurisdiction to grant injunction restraining plaintiffs in Malaysia from proceeding with meeting of board of directors ('BOD') of plaintiffs' branch in Vietnam — Whether injunction was not directed at the Vietnam branch but against the plaintiffs who were resident in Malaysia and within the Court's jurisdiction — Whether defendants had shown that if BOD meeting went ahead irreversible changes would be made to composition of Vietnam branch which would seriously prejudice defendants — Whether damages were therefore not an adequate remedy — Whether balance of convenience dictated that status quo should be maintained until civil suit between plaintiffs and defendants had been determined

The defendants, who were incorporated in Italy and were mainly in the business of making and supplying packaging solutions and labelling machines, went into joint-venture with the second plaintiff ('P2') with the intention of finding new markets for their products in Malaysia and South East Asia. Towards that end, the parties established a joint-venture company (the first respondent, 'P1') in which the defendants and P2, respectively held 70% and 30% of the shareholding. P2 was the sole director of P1. In due course, P1 incorporated its branch in Vietnam ('the Vietnam branch') in which it held 60% of the shares while a Vietnamese partner ('Johnny Hoa') held the remaining 40% of the shares. Without prior consultation or notice to the defendants, P2, purportedly acting on P1's behalf, appointed another Malaysian in his place to represent P1 as shareholder in the Vietnam branch. P2 thereafter called for a 'Members' Council Meeting (akin to a board of directors meeting) of the Vietnam branch to pass the following 'Proposed Resolutions': (a) to appoint himself as a second 'legal representative' of P1 in the Vietnam branch (in addition to Johnny Hoa) and also as 'General Director' of the Vietnam branch (which would have made Johnny Hoa, who had all the while been the sole director of the Vietnam branch, subservient to P2); (b) amend the charter (or articles of association/constitution) of the Vietnam branch to provide for the office of General Director; and (c) approve the contents of certain employment contracts that Johnny Hoa and P2 had with the Vietnam branch. The defendants took issue with these unilateral moves by P2, especially with regard to the employment contracts which would have involved additional expenditure on P1's part. Through their solicitors, the defendants

requested P2 to cease and desist from using P1 as a vehicle to alter the composition of the 'Members' Council' of the Vietnam branch and to promptly convene a video-conference meeting of the shareholders of P1 to discuss the developments affecting the Vietnam branch. Their requests were not heeded and P2 appeared determined to proceed with holding the Members' Council meeting. The defendants filed the instant applications for an interlocutory injunction to, inter alia, restrain the plaintiffs from convening or proceeding with the Members' Council meeting in respect of the Vietnam branch to consider and pass the Proposed Resolutions. The defendants contended that the injunctive reliefs were necessary to preserve the status quo and the integrity and substratum of the instant civil suit between the parties that was pending determination. The defendants said that if the Proposed Resolutions were allowed to be passed, it would prejudice them in a permanent and irreversible way. Among the arguments taken by the plaintiffs for disallowing the injunction applications were that: (i) the High Court had no jurisdiction to injunct acts that were to occur in Vietnam; that only the courts in Vietnam could determine whether or not P1 as a shareholder of the Vietnam branch could convene a meeting to deliberate upon and pass the Proposed Resolutions; (ii) the injunctions could not be granted in the absence of a pre-existing cause of action; the defendants had not pleaded any case for reliefs in respect of either the Vietnam branch or P2's capacity as a director; (iii) that the defendants did not have the right as shareholders in P1 to interfere with the management powers vested in P2 as a director of P1 or to exercise any proprietary interest in the assets of P1 (of which the Vietnam branch was one); and (iv) the Proposed Resolutions did not prejudice the defendants or the integrity of the civil suit herein.

Held, granting the injunctions sought by the defendants:

(1) Based on the documentary evidence, the defendants had grounds for questioning P2's conduct and motive in trying to get the Proposed Resolutions passed in haste. There did not appear to be an imminent need for the Members' Council meeting to take place to pass the Proposed Resolutions. The Proposed Resolutions would have given P2 almost complete control over the Vietnam branch as General Director and would have made the other 'director' there, Johnny Hoa, subservient to him. It would have also involved the payment of a substantial monthly salary to P2 in his capacity as the second Legal Representative in the Vietnam branch (see paras 83–84).

(2) This court had jurisdiction to grant the injunctions prayed for. The injunction applications sought to directly restrain P2 (and P1 through P2), who were in Malaysia, from proceeding with the meeting to pass the Proposed Resolutions in Vietnam. The injunctions were not to restrain the Vietnam branch from acting, although the effect of granting the

injunctions would prevent the Proposed Resolutions from being proceeded with in Vietnam (see paras 90–91 & 107).

(3) The counterclaims of the defendants in the civil suit between the parties and the reliefs they sought provided the pre-existing cause of action that entitled them to the injunctions. The counterclaims also disclosed that there was a serious question to be tried. The defendants were not seeking via the injunctions to control the management of P1's business but only to maintain the status quo pending the outcome of the trial of the action (see paras 111–121 & 124).

(4) The balance of convenience lay in the defendants' favour for the injunction to be granted. Damages were not an adequate remedy because the harm that would befall the defendants was not of a kind that was capable of being quantified. Given the enormous amount of control P2 would have if the Proposed Resolutions were passed, it would not be feasible to reverse the steps that P2 would have taken in the Vietnam branch if the defendants were to succeed in their counterclaims (see paras 137–138).

(5) As the events that led to the filing of the injunction applications showed an acrimonious conflict between P2 and the defendants, as shareholders, over the manner in which P1 was managed and controlled, the interlocutory injunctions ought to be granted to preserve the status quo and to ensure that the integrity and substratum of the instant civil suit was not destroyed pending the trial and determination of the action (see paras 140–141).

[Bahasa Malaysia summary

Defendan, yang ditubuhkan di Itali dan terutamanya dalam perniagaan membuat dan membekalkan pembungkusan solusi dan mesin pelabelan, memasuki usaha sama dengan plaintif kedua ('P2') dengan tujuan mencari pasaran baru untuk produk mereka di Malaysia dan Asia Tenggara. Diakhirnya, pihak-pihak menubuhkan satu syarikat usaha sama (responden pertama, 'P1') yang manadefendan dan P2, masing-masing memegang 70% dan 30% pegangan saham. P2 adalah pengarah tunggal P1. Lanjutan daripada itu, P1 menubuhkan cawangannya di Vietnam ('cawangan Vietnam tersebut') di mana ia memegang 60% saham sementara rakan kongsi Vietnam ('Johnny Hoa') memegang baki 40% saham. Tanpa sebarang rundingan atau makluman terlebih dahulu kepada defendan, P2, yang kononnya bertindak bagi pihak P1, melantik seorang Malaysia di tempatnya untuk mewakili P1 sebagai pemegang saham di cawangan Vietnam. P2 kemudiannya memanggil 'Mesyuarat Majlis Anggota' (seperti mesyuarat ahli lembaga pengarah) cawangan Vietnam untuk meluluskan 'Resolusi yang Diusulkan' berikut: (a) untuk melantik dirinya sebagai 'wakil sah' kedua P1 cawangan di Vietnam (selain Johnny Hoa) dan juga sebagai 'Ketua Pengarah' cawangan Vietnam (yang akan menjadikan

A Johnny Hoa, yang selama ini menjadi pengarah tunggal cawangan Vietnam, di bawah P2); (b) meminda piagam (atau perkara-perkara persatuan/perlembagaan) cawangan Vietnam untuk menyediakan jawatan Ketua Pengarah; dan (c) meluluskan kandungan kontrak pekerjaan tertentu Johnny Hoa dan P2 dengan cawangan Vietnam. Defendan membantah
B tindakan sebelah pihak oleh P2 ini, terutamanya berkaitan dengan kontrak pekerjaan yang akan melibatkan perbelanjaan tambahan dari pihak P1. Melalui peguamcara mereka, defendan meminta P2 untuk berhenti daripada menggunakan P1 sebagai kenderaan untuk mengubah komposisi 'Majlis Anggota' cawangan Vietnam dan untuk segera mengadakan mesyuarat
C persidangan video pemegang saham P1 untuk membincangkan perkembangan yang mempengaruhi cawangan Vietnam. Permintaan mereka tidak dilayan dan P2 tampak nekad untuk terus mengadakan mesyuarat Majlis Anggota. Defendan memfailkan permohonan semasa bagi satu injunksi
D interlokutori untuk, antara lain, menahan plaintif daripada mengadakan atau meneruskan mesyuarat Majlis Anggota berkenaan dengan cawangan Vietnam untuk mempertimbangkan dan meluluskan Resolusi yang Diusulkan. Defendan berpendapat bahawa relif injunksi adalah diperlukan untuk mengekalkan status quo dan integriti dan substratum tindakan sivil semasa
E antara pihak-pihak yang sedang menunggu keputusan. Defendan mengatakan bahawa sekiranya Resolusi yang Diusulkan dibiarkan diluluskan, ia akan memprejudiskan mereka secara kekal dan tidak dapat dipulihkan. Di antara hujahan yang dikemukakan oleh pihak plaintif untuk menolak permohonan injunksi adalah bahawa: (i) Mahkamah Tinggi tidak mempunyai bidang kuasa
F untuk menghalang tindakan yang berlaku di Vietnam; bahawa hanya mahkamah di Vietnam yang dapat menentukan sama ada P1 sebagai pemegang saham cawangan Vietnam dapat mengadakan mesyuarat untuk mempertimbangkan dan meluluskan Resolusi yang Diusulkan; (ii) injunkis tersebut tidak dapat dibenarkan oleh ketiadaan kausa tindakan yang telah
G wujud; defendan tidak memplidkan sebarang kes untuk relif baik dari segi cawangan Vietnam atau kapasiti P2 sebagai pengarah; (iii) bahawa defendan tidak mempunyai hak sebagai pemegang saham di P1 untuk mengganggu kuasa pengurusan yang diberikan P2 sebagai pengarah P1 atau untuk menggunapakai kepentingan proprietari dalam aset P1 (yang mana cawangan
H Vietnam adalah satu daripadanya); dan (iv) Resolusi yang Diusulkan tidak menjejaskan defendan atau integriti tuntutan sivil di sini.

Diputuskan, membenarkan perintah yang dipohon oleh defendan:

I (1) Berdasarkan keterangan dokumentari, defendan mempunyai alasan untuk menyoal tindakan dan motif P2 dalam cubaan agar Resolusi yang Diusulkan diluluskan dengan tergesa-gesa. Tidak ada keperluan segera untuk mesyuarat Majlis Anggota dijalankan untuk meluluskan Resolusi yang Diusulkan. Resolusi yang Diusulkan akan memberikan P2 kawalan sepenuhnya ke atas cawangan Vietnam sebagai Ketua Pengarah dan akan

menjadikan 'pengarah' lain di sana, Johnny Hoa, di bawahnya. Ia juga melibatkan pembayaran gaji bulanan yang besar kepada P2 dalam kapasitinya sebagai Wakil Perundangan kedua di cawangan Vietnam (lihat perenggan 83–84).

(2) Mahkamah ini memiliki bidang kuasa untuk memberikan perintah yang dimohon. Permohonan injunksi dimohon untuk secara langsung menahan P2 (dan P1 melalui P2), yang berada di Malaysia, dari meneruskan mesyuarat untuk meluluskan Resolusi yang Diusulkan di Vietnam. Perintah tersebut bukan untuk menghalang cawangan Vietnam dari bertindak, walaupun kesan pemberian injunksi tersebut akan menghalang Resolusi yang Diusulkan agar tidak diteruskan di Vietnam (lihat perenggan 90–91 & 107).

(3) Tuntutan balas defendan dalam tuntutan sivil antara pihak-pihak dan relif yang dimohonnya memberikan kausa tindakan yang sudah wujud yang membenarkan mereka injunksi tersebut. Tuntutan balas tersebut juga mendedahkan bahawa terdapat persoalan serius yang harus dibicarakan. Defendan tidak memohon melalui injunksi untuk mengawal pengurusan perniagaan P1 tetapi hanya untuk mempertahankan status quo sementara menunggu keputusan perbicaraan tindakan tersebut (lihat perenggan 111–121 & 124).

(4) Imbangan kemudahan terletak bagi pihak defendan agar injunksi tersebut dapat dibenarkan. Ganti rugi bukanlah remedi yang mencukupi kerana kemudaratan yang akan menimpa defendan bukan dari jenis yang dapat dihitung. Memandangkan P2 akan mendapat sebahagian besar kawalan sekiranya Resolusi yang Diusulkan diluluskan, ianya tidak mungkin untuk menukar langkah yang akan diambil P2 di cawangan Vietnam sekiranya defendan berjaya dalam tuntutan balas mereka (lihat perenggan 137–138).

(5) Oleh kerana peristiwa yang menyebabkan kepada pemfailan permohonan injunksi menunjukkan konflik sengit antara P2 dan defendan, sebagai pemegang saham, mengenai cara P1 dikendalikan dan dikawal, injunksi interlokutori harus diberikan untuk mengekalkan status quo dan untuk memastikan bahawa integriti dan substratum tindakan sivil segera semasa tidak dihancurkan sementara menunggu perbicaraan dan penentuan tindakan tersebut (lihat perenggan 140–141).]

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, CA (refd)

Dato' Jaffar bin Mohd Ali & Anor v Jasatera Bhd & Ors [2000] 2 ML J 277, CA (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA (folld)

Konamaneni and others v Rolls-Royce Industrial Power (India) Ltd and others [2002] 1 BCLC 336 (refd)
Manjeet Singh a/l Santokh Singh v CPA Australia Ltd & Ors [2013] 7 MLJ 729, HC (folld)
Nihamatsu Construction Co Ltd v Kecom Sdn Bhd [2009] 2 MLJ 404, CA (folld)
Oro Negro Drilling Pte Ltd and others v Integradora de Servicios Petroleros Oro Negro SAFI de CV and others and another appeal (Jesus Angel Guerra Mendez, non-party [2020] 1 SLR 226, CA (refd)
Pergamon Press Ltd Maxwell [1970] 2 All ER 809, Ch D (distd)
Peter Ola Blomqvist v Zavarco Plc (previously known as Vasseti (UK) PLC) & Ors and other appeals [2016] MLJU 1717, CA (refd)
Reeves v Sprecher and Others [2007] 2 BCLC 61 (distd)
Siskina (Cargo Owners) v Distos Campania Naviera SA [1979] AC 210 (folld)

Legislation referred to

Companies Act 2016 s 310(b)
Rules of Court 2012 O 29

Alvin Tang Wye Keet (Kelly Khoo with him) (Bodipalar Ponnudurai De Silva) for the plaintiffs.
Sudharsanan a/l Thillainathan (Dawn Wong Keng Jade with him) (Steven Thiru & Sudhar Partnership) for the first defendant.
Kevin Prakash a/l Thirunavukarasu (Nanneri Nanggai a/p Vengadasalam with him) (Kevin Prakash) for the second defendant.

Wan Muhammad Amin JC:

[1] By a notice of application dated 13 September 2020 the first defendant applied for an interlocutory prohibitory injunction under O 29 of the Rules of Court 2012 ('ROC') (encl 116).

[2] By a notice of application dated 15 September 2020 the second defendant also applied for an interlocutory prohibitory injunction under O 29 of the ROC (encl 121) which reliefs are almost identical to that of encl 116.

[3] The subject matter of the injunctions sought in both encls 116 and 121 ('applications') are the same and even the grounds in support of the applications are substantially the same. In fact, when encl 116 was called up for its first case management on 14 September 2020, learned counsel for the second defendant, Mr Kevin Prakash, informed the court that the second defendant will be filling a similar application, which it did in encl 121.

[4] Therefore, encls 116 and 121 were heard and decided together.

[5] In this regard, at the hearing of both these applications, learned counsel for the second defendant adopted the submissions of learned counsel for the first defendant, Mr Sudhar Thillainathan, and added on to those submissions where they were either not covered by learned counsel for the first defendant or where learned counsel for the second defendant wished to put further emphasis on them.

[6] The English version of the reliefs sought in encl 116 are as follows:

1. An injunction to restrain the Second Plaintiff, whether by himself, his agents, employees and/or servants howsoever from convening and/or proceeding with a members' council meeting pursuant to an Invitation to Members' Council Meeting dated 4 September 2020 ('*the second intended MC meeting*') in his purported capacity as a 30% shareholder of the First Plaintiff and/or the sole director of the First Plaintiff, in respect of The Packaging Company Limited ('*Vietnam Branch*') in order to deliberate and/or resolve the following matters pending the disposal of the suit herein or until such further order(s) by this Honourable Court:
   (i) Appoint the Second Plaintiff to be the second 'legal representative' cum 'General Director' of the Vietnam Branch;
   (ii) Amend the 'Members' Council Charter'/'Company Act' of the Vietnam Branch; and
   (iii) Approve the contents of 'labour contracts' for the Vietnam Branch;
2. An injunction to restrain the Second Plaintiff, whether by himself, his agents, employees and/or servants howsoever from requisitioning, convening and/or proceeding with further meetings in his purported capacity as a 30% shareholder of the First Plaintiff and/or the sole director of the First Plaintiff, in respect of the Vietnam Branch in order to deliberate and/or resolve the following matters pending the disposal of the suit herein or until such further order(s) by this Honourable Court:
   (i) Appoint the Second Plaintiff to be the second 'legal representative' cum 'General Director' of the Vietnam Branch;
   (ii) Amend the 'Members' Council Charter'/'Company Act' of the Vietnam Branch; and
   (iii) Approve the contents of 'labour contracts' for the Vietnam Branch;
3. An injunction to restrain the First Plaintiff on similar terms;
4. All costs incidental to and arising out of this application to be borne by the Second Plaintiff; and
5. Such further or other relief which this Honourable Court deems fit and proper to grant.

A **[7]** The Bahasa Malaysia version of encl 121 is almost identical in every word with encl 116.

BACKGROUND

B **[8]** The first plaintiff is a joint venture company which was said to be engaged in the business of developing and supplying filling and packaging solutions, labelling machines and providing after sales service and support, which included the supply of spare parts.

C **[9]** The defendants are both companies incorporated under the laws of Italy.

[10] The first defendant's principal business activities are said to be in the **D** supply of filling and packaging solutions, brewing systems, soft-drink lines, production facilities, processing and packaging solutions.

[11] The second defendant's principal business activities are said to be in the supply of labelling machines ranging from cold glue, self-adhesive, hot-melt, **E** roll-fed and combination systems.

[12] At the commencement of this action the first plaintiff had three shareholders, the brief details of which are as follows:

F (a) the second plaintiff holding 30% of the first plaintiff's shares;

(b) the first defendant holding 35% of the first plaintiff's shares; and

(c) the second defendant holding 35% of the first plaintiff's shares.

G **[13]** The second plaintiff is the sole director of the first plaintiff.

[14] The second plaintiff is the sole owner of YM Research Sdn Bhd ('YM Research') which is said to be the second plaintiff's corporate vehicle controlled by him.

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[15] The dispute between the parties herein mainly involve the following agreements or understanding:

(a) shareholders' agreement dated 23 November 2015 between the second defendant and one YM Research and the first plaintiff ('SA'); **I**

(b) joint collaboration agreement dated 23 November 2015 between the second defendant, YM Research, the first defendant and the first plaintiff ('JCA');

(collectively referred to as 'agreements');

(c) the 'understanding' — the terms in respect of the collaboration between parties alleged by the plaintiffs, which terms the plaintiffs claim were agreed upon at a meeting held on or about the 2 October 2014 in Italy between the second plaintiff and the representatives of the first and second defendants. These terms as pleaded in para 8 of the amended statement of claim dated 26 August 2019 (encl 4) are as follows:

> 8.1 The joint collaboration would be carried out through a company incorporated in Malaysia ('the JV Co').
>
> 8.2 The JV Co will develop and supply Packaging Solutions and Labelling Machines to Malaysia and South East Asia. This will also include the provision of after sales service and support on all products supplied by the JV Co which includes the supply of spare parts.
>
> 8.3 Any order procured by the JV Co (including after sales service and support) shall be fulfilled by the manufacture and supply of the same to the JV Go's customers by:-
>
> 8.3.1 CFT Italy, where it concerns the Packaging Solutions; and
>
> 8.3.2 PE Italy, where it concerns the Labelling Machines.
>
> 8.4 The JV Co shall be entitled to a profit margin over and above the sale price by CFT Italy and PE Italy respectively.
>
> 8.5 CFT Italy and PE Italy shall grant exclusivity to the JV Co for sales by the JV Co in Malaysia and South East Asia, and shall not compete with the JV Co.
>
> 8.6 The shareholding in the JV Co shall be held by PE Italy and Fred on a 70%:30% proportion. In the event CFT Italy wishes to participate in the equity of the JV Co at a later stage, CFT Italy will be entitled to acquire half the shareholding held by PE Italy in the JV Co.
>
> 8.7 Fred shall be responsible for overseeing and spearheading the operations of the JV Co, which includes identifying and pursuing a client base of prospective purchasers within Malaysia and South East Asia for the Packaging Solutions and the Labelling Machines.
>
> 8.8 The business of the JV Co shall be expanded in South East Asia at a later stage by the incorporation of branch offices in amongst others Thailand, Indonesia and Vietnam, in collaboration with local partners.
>
> ('the said understanding')

(d) the share swap agreement — according to the plaintiffs, there then arose an issue with respect to the first defendant leaving the joint venture and this then led to an agreement in which the shareholding in the first plaintiff would ultimately be changed. The share swap agreement was allegedly concluded by way of an email and was supposed to have been completed by 30 June 2019. Upon the completion of the share swap

A agreement the shareholding of the companies would be as follows:
first plaintiff:
(A) second defendant — 52%; and
(B) second plaintiff – 48%
B Vietnam branch:
(A) second defendant — 30%;
(B) first defendant — 30%; and
(C) Tran Thai Hoa (Johnny Hoa) — 40%
C ('share swap agreement')

The plaintiffs' pleaded case

[16] It is the plaintiffs' pleaded case that notwithstanding the execution of
D the SA and the JCA, in carrying out the joint collaboration in the first plaintiff, the parties did *not* follow the terms contained therein and that instead, the second plaintiff and the defendants regulated their relationship in accordance with the terms of the said understanding.

E **[17]** The plaintiff's further pleaded that in the circumstances, the parties have by their conduct expressly and/or implicitly abandoned the terms of the agreements.

F **[18]** In para 12 of the amended statement of claim the plaintiffs provided particulars of these alleged abandoned terms as follows:

12.1 Contrary to paragraph 10.1.1 above, YM Research is and/or was not a registered shareholder of the Company. Instead, the 126,000 ordinary shares in the Company is held by Fred;

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12.2 Fred was also not required to sign a Deed of Accession and Ratification (of the SA) as stated in paragraph 10.1.4 above and is therefore not bound by the terms of either the SA or the JCA;

12.3 Although CFT Italy became a registered shareholder of the Company in
H November 2017 holding 147,000 ordinary shares (amounting to 35%) in the Company, such transfer of shares was not approved by written resolution of PE Italy and YM Research contrary to paragraphs 10.1.1 and 10.1.3;

12.4 CFT Italy also did not sign a Deed of Accession and Ratification (of the SA) as stated in paragraph 10.1.4 above and is therefore not bound by the terms of the SA;

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12.5 Contrary to paragraph 10.1.2 above, Fred is presently the sole director of the Company and was at all material times the only director appointed by the joint collaboration parties (namely Fred, PE Italy and CFT Italy);

12.6 Contrary to the indication of only Malaysia as the 'Territory' in the JCA, the Company's business from its inception was at all material times carried out all across South East Asia and included Thailand, Indonesia and Vietnam.

[19] It was further pleaded in para 13 of the amended statement of claim that in recognition of continuing validity of the said understanding, the first plaintiff had in or around May 2017 expanded its business in South East Asia by setting up a branch office in Vietnam, known as The Packaging Company Ltd, to cater for the expanding customer base of the company in that jurisdiction ('the Vietnam branch').

[20] According to the plaintiffs the Vietnam branch was set up in the following manner:

(a) the Vietnam branch would takeover all of the company's existing clientele in Vietnam, and follow up on the company's ongoing projects in that region; and

(b) the Vietnam branch was incorporated with a local partner, namely Tran Thai Hoa (also known as Johnny Hoa) wherein the shareholding is as follows:

(i) the first plaintiff — 682,500,000 VND value of shares (60%); and

(ii) Johnny Hoa — 455,000,000 VND value of shares (40%)

[21] At this juncture it is important to highlight that the Vietnam branch is the subject matter of the applications. The shareholding of the Vietnam branch as stated above is not in dispute.

The defendants' defence and counterclaims

[22] The defendants' position is the exact opposite of the plaintiffs' pleaded case and can be summarised as follows:

(a) the defendants deny that the agreements have been abandoned;

(b) the agreements were never terminated and are valid, effective, and legally binding on the parties to the agreements;

(c) the defendants deny the said understanding;

(d) the share swap agreement is not a legally binding and conclusive agreement between the parties; and

(e) further, the parties to the share swap agreement were different from those in the agreements.

A **[23]** Both the defendants' counterclaims contain substantially the same reliefs and they include the followings:

(i) a declaration that the agreements are valid, binding, and enforceable and represents the entire agreement between the parties;

B (ii) a declaration that the share swap agreement is not legally binding and/or otherwise enforceable;

(iii) a declaration that the purported special resolution was illegally and/or unlawfully procured by the second plaintiff and is therefore void, of no C effect, and in breach of the agreements;

(iv) an order for specific performance of the agreements; and

(v) a declaration that the second plaintiff is not the legal and beneficial owner of 30% or 126,000 of the shares in the company.

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[24] The relief in the defendants' respective counterclaims stated in para 23(iii) above arose from the defendants' challenge to an amendment to the first plaintiff's articles of association by way of a special resolution dated 20 April 2017 ('purported special resolution'), whereby the number of directors of E the first plaintiff was reduced from 2 to 1 director. The defendants contend that the purported special resolution was signed by the second plaintiff as the purported 'Duly Appointed Corporate Representative' of the second defendant without the knowledge or approval of the defendants. Further, that the purported special resolution is said to be contrary to the agreements. F

[25] The defendants also challenge the second plaintiff's right to manage the first plaintiff. The defendants contend that the second plaintiff does not make decisions regarding the first plaintiff on his own and that it has been in the past G upon consultation with and the agreement of the defendants.

[26] The defendants' challenge to the second plaintiff's 30% shares in the first plaintiff is based on their stand that pursuant to the agreements YM Research shall be the local shareholder of the first plaintiff and not the second H plaintiff. Further, YM Research's shares in the first plaintiff were fully financed by the defendants. Therefore, if at all, the second plaintiff holds the 30% shares of the first plaintiff on trust for YM Research.

I **[27]** The specific issues pertaining to the plaintiffs' claim and the defendants' defence and counterclaim that were highlighted above are material to the applications, the significance of which will be shown later in this judgment.

[28] The decision in respect of both the applications turn upon these issues.

EVENTS THAT LED TO THE FILING OF THE APPLICATIONS

[29] The applications were filed as a result of recent events that transpired which later became known to the defendants. Below are the defendants accounts as to what had transpired between June and July 2020 that led to the filing of the applications.

[30] On or around 22 June 2020, it was brought to the first defendant's attention by Johnny Hoa that the second plaintiff was purporting to act on behalf of the first plaintiff by seeking to, inter alia, appoint one Mr Lam Kok Wai ('Lam Kok Wai') as a 'sole authorised representative' of the Vietnam branch, in replacement of the second plaintiff. The second plaintiff indicated to Johnny Hoa that 'additional key personnel' would be appointed to represent the first plaintiff's interests in the Vietnam branch.

[31] By way of email dated 22 June 2020 to Johnny Hoa, the second plaintiff enclosed what appeared to be a notice dated 22 June 2020 to the Vietnam branch in respect of changing authorisation for the first plaintiff in the Vietnam branch ('notice of appointment of sole authorised representative').

[32] In the same email Johnny Hoa also informed Mr Alessandro Merusi (the Chief Executive Officer of the first defendant) ('Alessandro Merusi') as follows:

> Ciao Nicola,
>
> We receive the letter/email from Fred as attached file. He appoint one Malaysian person to be in Vietnam Office as Director of Vietnam Office. From Legalpoint, he need to be agreed by Italy to do so,
>
> second point, he need to have agreed with me as Vietnam office.
>
> Let discuss with lawyer how to handle this.

[33] On 26 June 2020, Alessandro Merusi was informed by Johnny Hoa that the second plaintiff had sent a letter on 25 June 2020, requesting a board meeting between Johnny Hoa, the second plaintiff, and Lam Kok Wai. According to the defendants, in his email, Johnny Hoa enclosed a 'Proposal Letter (On Summoning A Members Council Meeting)' dated 25 June 2020 to the Vietnam branch ('proposal letter'), issued by the second plaintiff for and on behalf of the first plaintiff. This proposal letter purportedly called for the convening of a Members' Council Meeting on 7 July 2020.

[34] Amongst others, the reasons for convening the Members' Council Meeting on 7 July 2020 outlined the necessity of the appointment of a second 'legal representative', as well as the fact that the first plaintiff intends to have

greater involvement in the Vietnam branch to 'support and motivate the orientation and development strategy to expand the company's business larger'.

[35] At para No 2 of the proposal letter, the matters to be resolved at the Members' Council Meeting included the following:

(a) Appoint Mr Tran Thai Hoa and Mr Ma Soon Kwan to be the first and the second legal representative of Company;

(b) Amend Company's charter in relation to the content of point (a) mentioned above; and

(c) Approve and guarantee the contents of Labor contracts between Company and Mr Tran Thai Hoa and Mr Ma Soon Kwan — legal representatives of Company and sign and execute these labor contracts.

[36] The defendants claim at no time have the defendants authorised: (i) the appointment of Lam Kok Wai as 'sole authorised representative'; and (ii) the appointment of the second plaintiff as a second 'legal representative', to represent the first plaintiff at the Vietnam branch level. Further, the remuneration of the second plaintiff and Johnny Hoa (ie the labour contracts issue) were defined by the defendants as early as 2016. Any revision to their said remuneration would inevitably involve additional costs to the first plaintiff (of which the defendants are collective majority shareholders).

[37] By way of letters dated 3 July 2020 from the first defendant and second defendant's solicitors respectively, the defendants' solicitors requested that the second plaintiff provide a written undertaking to cease and desist from using the first plaintiff as a vehicle to alter the composition of the 'Members' Council' of the Vietnam branch (which is akin to a board of directors), in contravention of the agreements. In the event that the second plaintiff failed to do as requested, the defendants would proceed to seek urgent injunctive relief from this honourable court.

[38] By way of a letter dated 6 July 2020, the plaintiffs' solicitors responded to request for an extension of time until 9 July 2020.

[39] By way of letter dated 7 July 2020, the defendants' solicitors requested that a response be furnished by close of business on 7 July 2020, in view of the urgency of the matter.

[40] By way of letter dated 7 July 2020, the plaintiffs' solicitors responded to state that they would only be in a position to revert on 9 July 2020.

[41] The defendants claim that on 8 July 2020, at the second plaintiff's behest, three unknown persons visited the Vietnam branch for the purposes of serving a purported notice calling for the convening of the Members' Council Meeting on the second plaintiff's behalf. The object of the Members' Council Meeting is to, inter alia, appoint personnel to represent the interests of the first plaintiff.

[42] By way of letters dated 9 July 2020 from the first defendant and second defendant's solicitors respectively, the defendants' solicitors wrote to the second plaintiff's solicitors to, inter alia, place on record that the only reasonable inference that can be drawn in the circumstances is that the second plaintiff's actions were taken for, inter alia, an improper motive and/or purpose.

[43] By way of two letters, both dated 9 July 2020, the plaintiffs' solicitors stated, inter alia, as follows:

(a) there is no attempt to either replace Johnny or to appoint a 'sole authorised representative';

(b) the second plaintiff is an existing authorised representative of the first plaintiff in the Vietnam branch. Due to various travel restrictions caused by the COVID-19 pandemic, the second plaintiff is taking steps to appoint a professional who is physically present in Vietnam (ie Lam Kok Wai) to replace him as the authorised representative of the first plaintiff in the Vietnam branch; and

(c) there is no reason for any form of undertaking as requested by first defendant.

[44] By way of a letter dated 10 July 2020 ('the 10 July 2020 letter'), the plaintiffs' solicitors stated, inter alia, as follows:

(a) the agenda for the notice is primarily for the appointment of the second plaintiff as a 'legal representative' to the Vietnam branch, in addition to Johnny Hoa;

(b) the second plaintiff is acting within his rights as the sole director of the first plaintiff in ensuring that the first plaintiff's interests as a majority shareholder in the Vietnam branch are well protected; and

(c) any attempt by first defendant to prevent or restrict the second plaintiff's right to access the documents and records of the Vietnam branch is improper.

[45] By way of letters dated 27 August 2020 from the first defendant and second defendant's solicitors respectively, the defendants' solicitors wrote to the second plaintiff solicitors and stated, inter alia, as follows:

A (a) the intended appointment of the second plaintiff as a 'legal representative' to the Vietnam branch is a marked departure from the status quo;

(b) the second plaintiff is purporting to operate with a total lack of transparency and accountability in respect of the Vietnam branch.
B

(c) the second plaintiff does not have *carte blanche* to operate unilaterally as the sole decision-maker of the first plaintiff to the exclusion of the defendants; and

C (d) the defendants, who collectively hold 70% or 294,000 shares of the paid-up capital of the first plaintiff, require the second plaintiff as the sole formally-appointed director of the first plaintiff to proceed to convene a meeting of the shareholders of the first plaintiff held by way of video conference to discuss the following matters:

D (i) recent developments in respect of the Vietnam branch, which is an asset of the first plaintiff; and

(ii) the convening of a general meeting of the first plaintiff held by way of video conference pursuant to s 310(b) of the Companies Act 2016.
E

[46] By way of letter dated 4 September 2020 ('the 4 September 2020 letter'), the second plaintiff's solicitors responded to state, inter alia, that all the second plaintiff's actions in respect of the Vietnam branch were carried out to
F safeguard and protect the first plaintiff's interests and agreed to convene a meeting of the shareholders of the first plaintiff held by way of video conference.

[47] However, contrary to the position taken by the second plaintiff's
G solicitors at para 7 of the 4 September 2020 letter, the first defendant was informed on 8 September 2020 by its solicitors that the second plaintiff has made a renewed attempt to call for the convening the Members' Council Meeting for the purposes of:

H (a) appointing the second plaintiff as the second 'legal representative;

(b) amend the 'Company Act'; and

(c) approve labour contracts.

I **[48]** The plaintiffs confirm the following steps were taken in respect of the Vietnam branch:

(a) on or about 22 June 2020, Lam Kok Wai was appointed as authorised representative (in substitute of the second plaintiff) of the first plaintiff in the Vietnam branch;

(b) the substitution by Lam Kok Wai as the authorised representative was necessary because:

(i) the global Covid-19 pandemic prevented the second plaintiff from travelling to Vietnam; and

(ii) the convening of and subsequent participation in the members' council meeting of the Vietnam branch required the physical presence of the authorised representative. In this regard, Lam Kok Wai who resides in Vietnam is able to fulfil such role and act on the second plaintiff's instructions as the director of the first plaintiff.

(c) on or about 8 July 2020, the first plaintiff's appointed solicitors in Vietnam ('ZICOlaw') attended to the office of the Vietnam branch to request Johnny Hoa to convene a members' council meeting. Johnny failed and/or refused to comply with the said request. As such the first plaintiff had no choice but to requisition the convening of such meeting;

(d) on 25 August 2020, the first members' council meeting ('First Members' Council Meeting') of the Vietnam branch was attempted to be held at the office of the Vietnam branch. Unfortunately, on Johnny Hoa's instructions, the Vietnam branch refused to allow entry to the first plaintiff's authorized representatives and therefore the meeting was subsequently held at an alternative location ie the office of ZICOlaw;

(e) since Johnny Hoa failed and/or refused to attend the first members' council meeting, the first plaintiff issued a notice for a second members' council meeting ('second members' council meeting') to be held on 18 September 2020. This was met with resistance from Johnny Hoa who attempted to evade service of the notice of the second members' council meeting by preventing the first plaintiff's representatives from accessing the building premises of the Vietnam branch. The notice of the second members' council meeting was ultimately served via post to Johnny Hoa's residential address;

(f) the second members' council meeting did not proceed on 18 September 2020 as scheduled for the following reasons:

(i) encl 116 was filed on 13 September 2020 by the first defendant and encl 121 on 15 September 2020 by second defendant respectively; and

(ii) the parties recorded a consent order on 17 September 2020 where the plaintiffs agreed not to move the resolutions (to be tabled at the second members' council meeting) until 29 October 2020 pending the disposal of these applications.

(g) to facilitate the disposal of the applications, the second plaintiff had instructed the first plaintiff representatives to convene a third members'

council meeting on 30 October 2020 to deliberate the resolutions set out in the second members' council meeting notice ('third members' council meeting').

THE PRINCIPLES GOVERNING AN INTERLOCUTORY INJUNCTION APPLICATION

[49] Both the applications were filed with certificates of urgency and the plaintiffs had agreed to postpone the members' council meeting as stated above. In this connection, parties entered into a consent order on 17 September 2020 wherein the plaintiffs undertook not to move the resolutions intended to be passed at the said meeting pending the disposal of the applications which, the parties agreed shall be heard and be disposed of no later than 29 October 2020. This then gave time for the parties to complete their exchange of affidavits and file their respective written submissions.

[50] It was for these reasons that the applications were heard on 27 October 2020 and the decision delivered on 28 October 2020, before the third members' council meeting scheduled on 30 October 2020.

[51] The reliefs prayed for in the applications as set out in paragraph 6 above are interlocutory prohibitory injunctions and in this regard the following principles governing an application for an interlocutory injunction can be found in the passage from the Court of Appeal in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293:

> We begin by respectfully accepting that the correct approach to be adopted and the stages of reasoning involved in the process of arriving at the conclusion as to whether inter-locutory injunctive relief should be granted or withheld are those that have been neatly summarised by Hashim Yeop A Sani J, (as he then was) in *Mohamed Zainuddin v Yap Chai Seng* [1978] 1 MLJ 40. This is what that very eminent Judge said in that case (at p 42):
>
> > Firstly to discover whether the *plaintiffs case is frivolous or vexatious*. If it is not, then to decide in whose favour the *balance of convenience lies*. If these factors are evenly balanced it may not be improper for the Court to take into account any tipping in the balance as revealed by affidavits ... *Secondly*, if the plaintiffs were to succeed at the trial, *whether they would be adequately compensated for the interim restriction on their activities which the grant of an interlocutory injunction would have imposed*. The judge then considers the *balance of convenience*, and if the relevant factors were evenly balanced the court should grant an interlocutory injunction which would maintain the *status quo*. *It is said that at that stage the court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits.* (Emphasis added.)

[52] Therefore, based on *Keet Gerald* this court is not to embark on a factual

finding of facts on facts in dispute but to be satisfied by the defendants' pleaded case and evidence adduced in the applications, as to whether there is a serious question to be tried

[53] In *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 at p 510 it was held as follows:

> Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as 'a probability', 'a prima facie case', or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. *The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried*. (Emphasis added.)

[54] Therefore, to determine whether to grant the injunctions sought in the applications, the court must be satisfied that:

(a) there is a serious question to be tried;

(b) the balance of convenience lies in favour of the applicant; and

(c) that damages are not an adequate remedy.

[55] Bearing these principles in mind I will now turn upon the merits of the applications.

MERITS OF THE APPLICATIONS

[56] The injunctions that are sought are essentially to restrain the second plaintiff (together with the first plaintiff) from convening or proceedings with the Member Council Meeting of the Vietnam branch and specifically in respect of the resolutions to:

(a) appoint the second plaintiff to be the second 'legal representative' cum 'General Director' of the Vietnam branch;

(b) amend the 'Members' Council Charter'/'Company Act' of the Vietnam branch; and

(c) approve the contents of 'labour contracts' for the Vietnam branch.

('proposed resolutions')

[57] Before going into the details of the proposed resolutions, it is important to first understand the corporate structure of the Vietnam branch.

[58] The Vietnam branch has two authorised representatives (which is said to be equivalent to shareholders of a company in Malaysia) appointed to a Members Council.

[59] The brief details of the shareholding of the Vietnam branch as stated earlier are as follows:

(a) the first plaintiff owns 60%; and

(b) Johnny Hoa owns 40%.

[60] As the first plaintiff is a corporate entity, it is required to appoint an individual as an authorised representative to carry out its rights and obligations in the members' council. Johnny Hoa, on the other hand is automatically a member of the members' council.

[61] Lam Kok Wai (who resides in Vietnam) is the corporate representative of the first plaintiff and he represents the first plaintiff's 60% shares in the Vietnam branch.

[62] The function of an authorised representative includes physical attendance at the members' council meeting to be able to conduct such meeting on behalf of the shareholder he represents.

[63] The Vietnam branch has only *one legal representative* (which is said to be equivalent to a company *director* in Malaysia) and that legal representative is Johnny Hoa.

[64] It is said that the Vietnam branch has, at material times since the first plaintiff's involvement, had only *one legal representative,* Johnny Hoa.

The second plaintiff's reasons for the proposed resolutions

[65] The plaintiffs' reasons for moving the proposed resolutions are provided in paras 33, 33.1–33.4 and 34 of the plaintiffs' affidavit in reply (encl 127). The second plaintiff claim that subsequent to the filing of the suit herein (in August 2019), problems arose between the first plaintiff and the Vietnam branch wherein:

(i) the Vietnam branch stopped responding to the first plaintiff's queries for information sought by the first plaintiff such as financial updates and sales forecast;

(ii) even when the Vietnam branch provided such information to the first plaintiff, it is only after numerous reminders and warnings of potential penalties have been sent;

(iii) these financial updates from the Vietnam branch have instead only been provided to the defendants to the exclusion of the first plaintiff; and

(iv) this situation is further compounded by the defendants' actions of insisting that the first plaintiff no longer needs to be involved in the affairs of the Vietnam.

[66] According to the plaintiffs, as the first plaintiff was being blocked by Johnny Hoa and/or the defendants from accessing information relating to the Vietnam branch, there was an urgent need to appoint the second plaintiff as an additional legal representative in the Vietnam branch. To facilitate such appointment, it is necessary under Vietnamese laws for a members' council meeting to be convened to pass the resolution for his appointment as legal representative.

[67] In support of these reasons the plaintiffs' have exhibited in 'exh FM12A' of encl 127 email correspondences between representatives of the first plaintiff, the Vietnam branch and the defendants in respect of the first plaintiff's requests for financial information ('emails'). Most of these emails are in 2020.

[68] The defendants denied the aforesaid reasons given by the plaintiffs and averred, inter alia, that the emails *merely* demonstrates that there was a *delay* in furnishing the information sought by the second plaintiff. Furthermore, there is no basis for the second plaintiff to assert that the financial updates have instead only been provided to the defendants to the exclusion of the first plaintiff and that in this regard at p 247 of 'exh FM12A' of encl 127, by email dated 14 February 2020 (in which the representatives of the first defendant's were copied), one Wai Hoh of the first plaintiff was requesting for information on behalf of the first defendant directly to Johnny Hoa.

[69] The defendants have also denied that they did not want the first plaintiff to be involved in the affairs of the Vietnam branch and that it was quite the opposite and that 'exh FM13' in encl 127 does not reflect the second plaintiff averment as stated in in para 65(iv) above. Their complaint was with the second plaintiff's involvement not the first plaintiff per se.

[70] The defendants contend that the injunctive reliefs sought are necessary to preserve the status quo, integrity and substratum of this civil suit pending its full and final determination after full trial. If the applications are not allowed and the proposed resolutions are passed, the impact on the defendants could be permanent and irreversible. If the defendants are ultimately successful in this civil suit, it would be difficulties in declaring the proposed resolutions null and void and to set it aside so as to revert to the position before the passing of the proposed resolutions.

A **[71]** Putting it another way, what the defendants' are ultimately saying is that the plaintiffs and specifically the second plaintiff (being the directing mind of the first plaintiff as its sole director) is attempting to steal a march on the defendants.

B **[72]** This issue will again turn upon the proposed resolutions themselves and how it would impact the defendants' position in this action, that is whether the defendants' case in particular their counterclaims would be prejudiced by these proposed resolutions.

C **[73]** It is therefore important to review the precise wording of the proposed resolutions and related documents. Both the plaintiffs and the defendants have provided an English translation of what is said to be the equivalent to a notice calling for a meeting of shareholders of the Vietnam branch issued by the first D plaintiff on 4 September 2020 ('notice'). Both English translations appear to be substantially the same. For the purpose of the applications I will refer to the plaintiffs' translation of the notice and its related documents as the plaintiffs have opposed the applications.

E **[74]** The English translation of the notice in 'exh FM14' of encl 127 is the 'Invitation Letter For Convening The Meeting Of The Members' Council' ('invitation letter'). The relevant portion of the invitation letter is reproduced below:

F > Based on the above, by this. Invitation Letter, we respectfully invite you being the member of the Company currently holding a capital contribution valued at VND455,000,000 (accounting for 60% of the charter capital of the Company) to attend the meeting of the Members' Council convened for the second time to discuss and settle the following matters:
>
> G (a) Appointing *Mr Ma Soon Kwan* as the *second representative cum General Director* of the Company;
>
> (b) *Amending the Company's Charter* in relation to the contents as mentioned in item *(a) above* - the Draft Appendix amending the Company's Charter attached to this Invitation in Appendix 2 for your reference; and
>
> H (c) *Approving the contents of the labour contracts* between the Company and Mr Tran Thai Hoa and *Mr Ma Soon Kwan*, who are the legal representatives of the Company and the execution and performance of such labour contracts. (Emphasis added.)

I **[75]** Appendix 1 of the invitation letter is the agenda of the members' council meeting which includes, inter alia, the agendas to discuss and approve the above three proposed resolutions in the invitation letter.

[76] Appendix 2 of the invitation letter is a document entitled 'Draft Appendix Amending the Charter of the Packaging Company Limited' ('proposed amendments') and contains the proposed amendments to the Charter (which is said to be equivalent to the articles of association or otherwise the Constitution of a company), referred to in para (b) of the invitation letter. The relevant portions of the proposed amendments are as follows:

> 6.5 The First Legal Representative shall have the rights and obligations of the Director as set out under Article 24a of this Charter. The Second Legal Representative shall have the rights and obligations of the *General Director* as set out under Article 24 of this Charter.
>
> *Article 2. Supplementing Article 24a of the Company's Charter as follows:*
>
> *Article 24a. Director*
>
> The *Director* has the following rights and obligations:
>
> 24a.1 To organize the *implementation of decisions of the General Director*.
>
> 24a.2 To *assist the General Director* in all matters relating to the day-to-day business operation of the company.
>
> 24a.3 To sign labour contracts with employees who are under staff level subject to the authorization of the *General Director*.
>
> 24a.4 To *implement other rights and obligations* as may be delegated by the *General Director* from time to time.
>
> *Article 3. Amending Article 24 of the Company's Charter as follows:*
>
> *Article 24. General Director*
>
> 24.1 The *General Director* is the person who *manages the day-to-day business operations* of the company and is responsible to the Members' Council for the exercise of his or her rights and the performance of his or her obligations.
>
> 24.2 The *General Director* has the following rights and obligations:
>
> (a) To organize the implementation of resolutions of the Members' Council;
>
> (b) To *make decisions on all matters* relating to the day- to-day business operations of the company;
>
> (c) To *organize the implementation of the business plan and investment plan* of the company;
>
> (d) To *issue the rules on internal management of the company* unless otherwise stipulated in the charter of the company;
>
> (e) To appoint, remove or discharge managerial positions in the company, except for those within the authority of the Members' Council;
>
> (f) To sign contracts in the name of the company, except for those

A within the authority of the chairman of the Members' Council;

(g) To make recommendations on the organizational structure of the company;

(h) To submit the final annual financial statements to the Members' Council;

B

(i) To recommend the plan for use of profit or for dealing with losses in business;

(j) To recruit employees;

C

(k) Other rights and obligations as stipulated in the charter of the company and in the labour contract which the General Director enters into with the company in accordance with resolutions of the Members' Council.'

D *Article 4*. This Appendix Amending the Charter *replaces corresponding terms of the Company's Charter* and shall take effect from the signing date. The remaining terms of the Company's Charter remain legally effective and valid. (Emphasis added.)

E **[77]** In the above proposed amendments, the first legal representative is Johnny Hoa and the second legal representative is the second plaintiff.

[78] In para 39 of encl 27, the second plaintiff justified the need for the proposed resolutions as follows:

F

39. In essence, the proposed resolutions sought to be passed by the Company (previously at the SMCM and now at the TMCM) are *simple and straightforward*, with the *ultimate purpose of ensuring better accountability and access to information*, which the Company is rightfully entitled to and had previously enjoyed without hindrance. In essence, the proposed resolutions entails:-

G

39.1 My appointment as 2nd legal representative to the Vietnam Branch in addition to Johnny. This is to allow the Company to have *direct access to the financial information and records* of its subsidiary (the Vietnam Branch) without having to rely on Johnny;

H

39.2 Confirmation of the remuneration (i.e. labour contracts) between the Vietnam Branch and both its legal representatives, i.e. Johnny and I. This is required because:-

(a) the terms of Johnny's remuneration although informally agreed upon, was never reflected in a formal agreement, which I am advised may be subject the challenge later under Vietnamese law; and

I

(b) the terms of my remuneration are to commensurate with my role as 2*nd* legal representative in the Vietnam Branch;

39.3 the necessary amendments to the members' council charter of the Vietnam Branch *to reflect or allow for the above*. (Emphasis added.)

[79] Further, it was submitted in para 16.1 of the plaintiffs' reply submissions (encl 147) that:

> If the said Resolutions are passed, Fred will be *one of two 'directors'* in the Vietnam Branch. *Fred cannot act alone* vis a vis the Vietnam Branch as *he will need the concurrence of the other 'director'*, Johnny who is clearly aligned to the defendants. As such, the defendants' interest in the Vietnam Branch (if any) is undoubtedly protected is able to fulfil such role and act on Fred's instructions as the director of the Company. (Emphasis added.)

[80] The defendants have denied that Johnny Hoa is aligned to them and that he represents his own interest in the Vietnam branch.

[81] The proposed resolutions as it is worded would give the second plaintiff a significant amount of power and control over the Vietnam branch in particular insofar as the proposed amendments are concerned. This is because the proposed resolutions entail the appointment of the second plaintiff as a second legal representative cum *General Director*.

[82] The proposed resolutions include the proposed amendments to the Vietnam branch Chatter which, inter alia, creates the position of General Director whose powers and control over the Vietnam branch are *not equal* to the other 'director' as the plaintiffs claim.

[83] Having examined the plaintiffs' reasons for the tabling of the proposed resolutions and the contents of the proposed resolutions, I find that:

(a) the plaintiffs main reason for the proposed resolutions is based on the plaintiffs' complain of not being informed and the documents provided to support their contention are mainly the Emails, mostly in 2020, exhibited in encl 127. These emails go as far as to support the plaintiffs allegation that there has been *delays* in obtaining information or financial updates and *not* that they were totally withheld or that the Vietnam branch failed to furnish them entirely. In this regard, the plaintiffs have other remedies or methods to address the problem. It is evident that the plaintiffs have legal representation in Vietnam, namely the ZICOlaw, which had assisted them in respect of the Vietnam branch as stated earlier;

(b) the proposed resolutions *more than* caters for the situation at hand regarding accessibility to information as alleged by the plaintiffs. As stated in paras 81–82 above, the proposed resolutions involve amendments to the Vietnam branch Charter which would give the second plaintiff almost complete control over the Vietnam branch as General Director. This appears to be against the second plaintiff's averment that the proposed resolutions are 'simple and straightforward,

with the ultimate purpose of ensuring better accountability and access to information';

(c) further, the plaintiffs' submission that the second plaintiff as second legal representative would be in an equal position to Johnny Hoa does *not* appear to be correct given that the second plaintiff as the Second Legal Representative Cum General Director would, as General Director, have more power than the other 'director' who is subservient to the General Director. This can be seen from the list of the General Director's powers in the proposed amendments;

(d) the proposed resolutions also include the payment of the legal representative's remuneration of about RM12,000 per month as submitted by learned counsel for the first defendant, Mr Sudhar Thillainathan, which I recall was said to be about right by learned counsel for the plaintiffs, Mr Alvin Tang;

(e) apart from the reason that the Vietnam branch is refusing or is delaying to provide the plaintiffs with information, there does *not* appear to be any reason of a serious or urgent nature which would necessitate the plaintiffs' immediate intervention in the manner as proposed in the proposed resolutions; and

(f) in this regard, as stated in para 65 above, the second plaintiff claimed that the problem regarding obtaining information from the Vietnam branch occurred subsequent to the filing of this action (in *August 2019*). The invitation letter and proposed resolutions were made in *September 2020*, about a year later. This does not show that there was an imminent need for calling the Vietnam branch's Members' Council Meeting.

[84] Therefore, based on the aforesaid matters the defendants are not without grounds for questioning the plaintiffs' conduct and motive in moving the proposed resolutions.

[85] In opposing the applications, the plaintiffs have essentially raised four grounds which are in many ways intertwined with each other and some of these issues have already been dealt with earlier. In any event, I will address each of them specifically below.

[86] In dealing with the plaintiffs' grounds for opposing the applications, the grounds in support of the applications would inevitably also be covered.

JURISDICTIONAL ISSUE

[87] It was submitted by learned counsel for the plaintiffs that the applications to restrain acts taking place in Vietnam, were filed in the wrong jurisdiction as it is not open to a Malaysian court to adjudicate on the internal management of a foreign company.

[88] Learned counsel for the plaintiffs then referred me to several cases in support of his submission.

[89] However, before I deal with those cases, it is important to first look at what exactly is sought to be restrained through the applications.

[90] The applications ultimately sought to restrain the second plaintiff (and the first plaintiff through the second plaintiff) from proceedings with the proposed resolutions in Vietnam.

[91] The injunctions sought therefore *directly* restrains the plaintiffs from acting (not the Vietnam branch) but the *effect* of the injunctions is that the proposed resolutions will not proceed in Vietnam.

[92] Therefore, the question is whether this is tantamount to restraining acts taking place in Vietnam. In connection to this, it was argued on behalf of the plaintiffs that the proper determination of whether or not the first plaintiff as a shareholder of the Vietnam branch (through its sole director) may convene a meeting to deliberate and pass the proposed resolutions, can only be made under Vietnamese laws and by the Vietnamese courts.

[93] In this regard, learned counsel for the plaintiffs referred me to the English case of *Pergamon Press Ltd Maxwell* [1970] 2 All ER 809 and in particular the following passage:

> That being the position, it seems to me, in the first place, that the New York court is the only proper tribunal in which the members of Incorporated could seek to control the exercise of this power. *It cannot be open to an English court to control the exercise of a fiduciary power of a discretionary nature arising in the internal management of a foreign company*. (Plaintiff's counsel's emphasis.)

[94] In *Pergamon* the defendant was the president of an American company in New York ('Incorporated'). An English company ('Limited') owned the controlling interest in Incorporated. The defendant was the chairman and managing director of Limited. The defendant was removed from the board of Limited and he was required to resign as a director in Incorporated which the defendant refused to do. The case was pertaining to a breach of the defendant's

fiduciary duty. The English High Court refused to grant a mandatory injunction compelling the defendant there to call a special meeting of Incorporated for the purpose of removing certain directors including the defendant.

[95] Following from the passage from *Pergamon* which was referred to me above, Pennycuick J in *Pergamon* went on to state the following:

> *But even if this difficulty were overcome*, the court would not, *at the instance of some only of the members of Incorporated*, make a *mandatory order* on the defendant *directing him to exercise his discretion in a certain manner*. That would, I think, be *contrary to* the principles on which the court acts in controlling trustees or others in the exercise of fiduciary discretionary powers. I observe, in parentheses, that if this were an English company, other remedies might be available. In any event, it seems to me that *Incorporated would be a necessary party to proceedings seeking such an order*. It is beside the point for this purpose that ex hypothesis, the defendant has wrongfully deprived the 70 per cent holders of an alternative remedy. (Emphasis added.)

[96] I am of the view that *Pergamon* can be distinguished as follows:

(a) the injunction sought was a *mandatory injunction* to compel the defendant there to call for a meeting of Incorporated and involved the English Court's control of the exercise of a *fiduciary power* of a *discretionary nature* arising in the internal management of a foreign company. This is not the issue in the present case herein. The defendants herein are *not* seeking to *compel* (or direct) the second plaintiff (and therefore the first plaintiff) from a *positive act* but to instead *restrain* him from acting. I am of the respectful view that there is a difference between the two;

(b) in *Pergamon*, the act of ordering a meeting of Incorporated to be called in New York is said to be *directly controlling* the affairs of the foreign company. Here, there is a dispute between shareholders in Malaysia, namely the second plaintiff and the defendants for, inter alia, the control and management of the first plaintiff, which owns 60% of the Vietnam branch. The defendants are seeking *preserve* the *status quo*, integrity and substratum of *this action* pending disposal of trial; and

(c) the High Court in *Pergamon* was also of the view that it was *necessary* for the foreign company, Incorporated, to be *made a party* in seeking such orders, that is the mandatory injunction. Again, I am of the respectful view that the Vietnam branch need not be made a party to this action for this court to grant an injunction to restrain the plaintiffs from acting to move the resolutions.

[97] Another case learned counsel for the plaintiffs referred to me to is the

case of *Konamaneni and others v Rolls-Royce Industrial Power (India) Ltd and others* [2002] 1 BCLC 336 which had applied *Pergamon*. The last part of the following passage from *Konamaneni* was quoted in the plaintiffs' written submissions but for completeness I have reproduced the whole para 55 of the reported judgment:

> [55] Two points are being made by Pennycuick J. The first point is unexceptional and indeed obvious, but it may be that the second proposition goes too far, in allocating exclusive responsibility to the courts of the place of incorporation for making orders controlling the exercise of discretionary powers. The decision predates the development of the modern forum non conveniens principles from later in the 1970s (see *The Atlantic Star, Owners of the Atlantic Star v Owners of the Bona Spes* [1973] 2 All ER 175; [1974] AC 436), and was given at a time when the prevailing view was that if the English court had jurisdiction, there was not normally a discretion to refuse to exercise it. If a similar point were to arise for decision today, I consider that the correct approach would be to say that the courts of the place of incorporation are very likely indeed to be the appropriate forum, but not so overwhelmingly that they will necessarily be the exclusive forum. *So understood, the Pergamon Press case confirms that questions of internal management are governed by the law of the place of incorporation, and that the courts of that place are best suited to give decisions on the control and extent of the powers of the management*. (Emphasis added.)

[98] Similar to the case of *Pergamon*, *Konamaneni* is also distinguishable and even more so as:

(a) firstly, it involves a *derivative action* against a foreign company in India. It was held that the English court did have jurisdiction to hear a derivative claim in relation to a foreign company. The applications herein and the injunctions sought are clearly not in relation to derivative actions which are vastly different; and

(b) secondly, it involves the issue of *forum conveniens* and it was held that the courts of the place of incorporation would almost invariably be the most appropriate forum for the resolution of the issues which related to the existence of the right of shareholders to sue on behalf of the company. This is tied to the issue that *Konamaneni* concerns a derivative action and hence the issue of *forum coveniens* became an issue because the company was in a different jurisdiction. This is also not the case in the present applications. Again, the injunctions are to restrain the plaintiffs and not the Vietnam branch.

[99] The third case referred to by learned counsel for the plaintiffs is the Court Appeal case of *Peter Ola Blomqvist v Zavarco Plc (previously known as Vasseti (UK) PLC) & Ors and other appeals* [2016] MLJU 1717 involving five appeals which arose from five separate applications filed by six defendants in the court below for a stay of the plaintiff's action on the ground that the

Malaysian court should not hear the issues and disputes forming the subject matter of the action as there is a *more appropriate forum* to hear and decide such issues and disputes in the interests of all the parties and for the ends of justice.

> [11] This was next followed by a specific plea against the sixth defendant of being the recipient of part of the unpaid shares and was therefore barred from requisitioning a general meeting or to vote at a meeting, Thus, the issue central to the claim, as we understand It, is the question whether the plaintiff's 1.2 billion shares were properly issued and allotted to the first and second defendants and the effect of such improper issuance and allotment. *However, the issue under consideration in these appeals is the exercise of the discretionary power of the court of first Instance to stay proceedings grounded on the doctrine of forum non conveniens.* The law, we apprehend, is that the defendants would have to satisfy the court that *some other forum is more appropriate*, and that it would be obligatory for a Malaysian court to consider in any event whether it would be unjust to the plaintiff to confine the defendants to remedies elsewhere. The defendants in this regard, submit that it is both illogical and perversely counter-intuitive to permit the plaintiff to pursue *this cause of action* half a world away from the unfolding of the actual events that inform and affect the present suit. This can be construed as an abuse of court process.
>
> ...
>
> [17] All these circumstances, in our opinion, show without any doubt strong connections with the United Kingdom. The shares are deemed issued in England and Wales by virtue of the plaintiff being incorporated in England and Wales. The shares are indeed the shares in the plaintiff while the transactions and dealings in the shares took place in the United Kingdom. Clearly, the situs of the subject matter is in the United Kingdom. The alleged pleaded tort of conspiracy to injure that Is the actual issuance of the shares and the breach of duties on the part of the defendants being the plaintiff's directors culminating with the alleged pleaded loss then purportedly suffered by the plaintiff are material to the question of appropriate forum. The whole dispute is wholly premised on, dependent upon and governed by the company law of the United Kingdom. The court in this regard will adopt the system of law which the transaction has the closest and most real connection (*Barkath AH bin Abu Backer v Anwar Kabir bin Abu Backer & Ors*). The *United Kingdom therefore would be a more suitable and competent forum to determine the dispute* in line with the prevailing United Kingdom's case law. (Emphasis added.)

[100] The case common feature in both *Konamaneni* and the above case of *Peter Ola Blomqvist* is that they both deal with whether there is a more appropriate *forum* to heard the case and *not* that the local court did not have jurisdiction.

[101] The other two cases referred to by the plaintiffs are the Singapore case of *Oro Negro Drilling Pte Ltd and others v Integradora de Servicios Petroleros Oro Negro SAFI de CV and others and another appeal (Jesus Angel Guerra Mendez, non-party* [2020] 1 SLR 226 and *Reeves v Sprecher and Others* [2007] 2 BCLC 61 which also dealt with the issue of the more appropriate forum. The case of *Reeves* in particular, like *Konamaneni* involves a derivative action.

[102] The defendants' counterclaim is based on *causes of action* in *Malaysia*, there is no dispute on this issue and therefore this court has jurisdiction to hear and determine the defendants' counterclaims. Forum is also not an issue. A

[103] Therefore, the real question here is whether the applications were filed in the wrong jurisdiction. B

[104] I would respectfully say that the answer is in the negative. As I have said earlier when I distinguished *Pergamon*, the applications sought to restrain the plaintiffs from a positive act of proceeding with the resolutions. It is *not* the Vietnam branch that is being restrained per se but the plaintiffs here in Malaysia. C

[105] It cannot be denied that as a 60% shareholder in the Vietnam branch the first plaintiff would have significant control over the Vietnam branch. The applications arose from an existing dispute between shareholders of the first plaintiff, that is the second plaintiff and the defendants and any decision regarding the management and control of the first plaintiff would inevitably affect the Vietnam branch. D

[106] I would further add that the cases cited such as *Pergamon*, *Konamaneni* and *Reeves* involve *final orders/reliefs* and do not involve interlocutory injunctions sought herein for the *interim preservation of rights* or *status quo* which is very different. E

[107] Therefore, I conclude that this court has jurisdiction to grant the injunctions as prayed for in the applications. F

PLEADING ISSUE (SERIOUS QUESTION TO BE TRIED)

[108] It was argued on behalf of the plaintiffs that there is no pleaded case or reliefs sought in respect of either the Vietnam branch or the second plaintiff's capacity as a director, and therefore no injunction can be granted without a pre-existing cause of action. Therefore, there is thus no causal link to this allegedly new issue of whether the first plaintiff (through the second plaintiff) can convene and move the proposed resolutions in a meeting at the Vietnam branch. G H

[109] In support of this argument the plaintiffs relied on the Court of Appeal case of *Nihamatsu Construction Co Ltd v Kecom Sdn Bhd* [2009] 2 MLJ 404 where it was held: I

> [3] In our judgment the injunction applied for should have not been granted because *there was no pleading against the appellant on which the injunction could issue*. It is settled law that the right to obtain an interlocutory injunction is not a cause of

action. *There must be a cause of action pleaded in the usual fashion before an interlocutory injunction may be applied for and obtained*. We consider it unnecessary to do more than refer to the following passage in the speech of Lord Diplock in the *Siskina (Cargo Owners) v Distos Campania Naviera SA* [1979] AC 210 at p 256,

> ... a right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. *It is dependent upon there being a pre-existing cause of action* against the defendant arising out of an *invasion, actual or threatened by him*, of a *legal or equitable right* of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court.
>
> *The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction*. (Emphasis added.)

[110] Therefore, based on the principles laid out in *Nihamatsu* which applied *Siskina (Cargo Owners) v Distos Campania Naviera SA* [1979] AC 210, for an interlocutory injunction to be granted:

(a) there must be a *pre-existing cause of action* which would entitle the applicant to the interlocutory injunction; and

(b) the interlocutory injunction is *to preserve the status quo* pending the ascertainment by the court of the rights of the parties, which *may or may not* include a *final injunction*.

[111] It is my considered view that based on the above principles the *exact reliefs* prayed for in the applications need *not* be prayed for in the defendants' counterclaims. I arrive at this conclusion from the following words in *Nihamatsu* read together with *Siskina*:

(a) 'an interlocutory injunction is merely *ancillary and incidental to* the *pre-existing cause of action*' and the words,

(b) 'which *may or may not* include a *final injuncion*'.

[112] Therefore, even if an applicant of an interlocutory injunction does *not* include a *final injunction* in his statement of claim/counterclaim but has pleaded a *cause of action* in his statement of claim/counterclaim to support the interlocutory injunction, it may be granted.

[113] In paras 22–26 of this judgment I have summarised the defendants' defence and counterclaim, ultimately, both the plaintiffs' case and the defendants' case are in respect of a *shareholders' dispute* and *control and management* of the first plaintiff.

[114] The plaintiffs' essentially seek to enforce the Understanding and the share swap agreement and declare the agreements invalid whereas the defendants seek to enforce the agreements and declare the share swap agreement invalid.

[115] Whilst I agree that there are no *precise* reliefs prayed for in terms of the injunctions sought in the applications, nevertheless, I find that there is a pre-existing cause of action in the defendants' counterclaims that entitle them to the said injunctions.

[116] In their defence and counterclaims, the defendants have pleaded, inter alia, that:

(a) the second plaintiff is not entitled to the 30% shares in the first plaintiff;

(b) the amendments made to the first plaintiff's articles of association which reduced the minimum number of the first plaintiff's directors to one was unilaterally done by the second plaintiff and is unlawful;

(c) there was no agreement that the second plaintiff would be the sole director of the first plaintiff;

(d) under the agreements the defendants have the right to appoint a director each to the first plaintiff's board;

(e) the defendants entrusted the second plaintiff with the day-to-day management of the first plaintiff and that he had betrayed their trust and confidence;

(f) the second plaintiff was at all material times an employee of the first plaintiff; and

(g) at all material times, it was expressly understood between the parties that the second plaintiff was obliged to obtain the defendants' approval in respect of all significant matters pertaining to the first plaintiff. That the second plaintiff does not act alone on these matters.

[117] In addition to the defendants' aforementioned pleaded case, the reliefs prayed for by the defendants that would entitle them to the injunctions are, inter alia, as follows:

> ii. A declaration that the Agreements are valid, binding, and enforceable and represents the entire agreement between the parties;
>
> iv. A declaration that the Purported Special Resolution was illegally and/or unlawfully procured by Fred and is therefore void, of no effect, and in breach of the Agreements;
>
> v. An order for specific performance of the Agreements.

vi. A declaration that Fred is not the legal and beneficial owner of 30% or 126,000 of the shares in the Company;

[118] As I had stated in para 105 above, the Vietnam branch is an asset of the first plaintiff. If the defendants' are successful in their counterclaims then they would have been able to take control of the first plaintiff which would include the Vietnam branch.

[119] Therefore, the injunctions sought in the applications are based upon the defendants' pleaded pre-exiting cause of action.

[120] The plaintiffs' also referred to the case of *Manjeet Singh a/l Santokh Singh v CPA Australia Ltd & Ors* [2013] 7 MLJ 729 where the High Court held that the plaintiff there could not be allowed to expand the scope of relief not covered by his original pleadings. However, in *Manjeet Singh*'s case the plaintiff there was seeking *interlocutory declaratory* orders as well as injunctions related to them when that declaratory relief and injunction were not prayed for in the plaintiff's statement of claim. It was further held that a declaratory order is decidedly *final* in nature and is not obtained via an interlocutory application. Further, there were no claims or cause of action resembling the interlocutory reliefs sought by plaintiff in *Manjeet Singh* which is different than in the present case herein.

[121] Having established that the defendants have a pre-existing cause of action which entitles them to the injunctions sought, it follows that there are serious questions to be tried in the defendants' counterclaims (*American Cyanamid*).

MERITS ISSUE — THE DEFENDANTS AS SHAREHOLDERS HAVE NO RIGHT TO INTERFERE IN MANAGEMENT OF A COMPANY

[122] On this issue the plaintiffs argue that the defendants, as shareholders, have neither any rights to interfere with the management powers vested in a director of the first plaintiff, nor any proprietary interest in the assets of the first plaintiff (which must necessarily include a subsidiary company).

[123] I am in agreement with the plaintiffs on the proposition of law that the business management control of a company (in this case the first plaintiff) resides with its directors and not its shareholders.

[124] However, I am of the considered view that the injunctions sought are *not* intended to control the first plaintiff's business management but instead seeks to maintain the *status quo* pending the outcome of the trial of this action.

[125] The merits of the applications have been addressed above and it is not necessary for me repeat them. I will, however, add that the chronology of the events that have transpired which led to the filing of the applications as observed and mentioned above, warrants the status quo to be maintained. I will touch upon this further when dealing with the prejudice issue.

THE PREJUDICE ISSUE (BALANCE OF CONVENIENCE AND WHETHER DAMAGES IS AN ADEQUATE REMEDY)

[126] It was submitted on behalf of the plaintiffs that the passing of the resolutions (to appoint a representative of the holding company on to the board of the subsidiary) does not in any way prejudice either the defendants or the integrity of the suit herein.

[127] It was further submitted on behalf of the plaintiffs that the status quo argument raised by the defendants similarly does not assist them as the prevailing status quo expounded in the *Cyanamid* test is not the existing state of affairs of the first plaintiff today, but is instead, the state of affairs existing prior to the issue of the writ. In connection to this the case of *Dato' Jaffar bin Mohd Ali & Anor v Jasatera Bhd & Ors* [2000] 2 ML J 277 was referred where Gopal Sri Ram JCA (as he then was) held:

> ... As to what is meant by the expression 'status quo', Lord Diplock said in Garden Cottage as follows (at p 140):
>
> > ... The *status quo* is the existing state of affairs; but since states of affairs do not remain static this raises the query; *existing when?* In my opinion, the relevant status quo to which reference was made in American Cyanamid is the *state of affairs existing during the period immediately preceding the issue of the writ* claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise *the state of affairs before the last change would be the relevant status quo*. (Emphasis added.)

[128] Again, I am in agreement with learned counsel for the plaintiffs insofar as the principle stated in the above case of *Dato' Jaffar* is concerned. However, the status quo the plaintiffs referred to is different than the status quo sought be maintained in the applications. The status quo referred to by the plaintiffs are as follows:

(a) that the second plaintiff as the sole director of the first plaintiff is the only person who can legally act on behalf of the first plaintiff;

(b) the management and affairs of the first plaintiff's subsidiary in Vietnam branch were at all times subject to the direction and

(c) consultation with its parent company through the second plaintiff as its director.

[129] The status quo sought to be maintained in the Applications is the status quo of the plaintiffs vis a vis the Vietnam branch existing during the period immediately preceding the issuance of the writ.

[130] The proposed resolutions sought to change the status quo of the plaintiffs in the Vietnam branch by, inter alia:

(a) appointing the second plaintiff to be the second 'legal representative' cum 'General Director' of the Vietnam branch;

(b) amending the 'Members' Council Charter' (or Constitution) of the Vietnam branch; and

(c) approving the contents of 'labour contracts' for the Vietnam branch.

[131] This was *not* the status quo when the writ was filed.

[132] Finally, I would be remiss if I do not refer to the argument concerning an earlier interlocutory injunction given by Justice Darryl Goon Siew Chye (as he then was) in encl 7 which were alluded to by learned counsel for the plaintiffs regarding 'preserving the status quo prevailing at the time of the action'.

[133] The injunction granted by Justice Darryl Goon in respect of encl 7 is, inter alia, as follows:

> An injunction be issued to restrain the defendants whether by itself, its directors, agents, servants, nominees or otherwise howsoever from removing and/ or taking any steps to remove the second plaintiff from his position as director of the first plaintiff;

[134] It is pertinent to note that the scope of the injunctions sought by the plaintiffs in encl 7 were in fact very wide and may not all have been specifically prayed for as well. Only prayer 1 out of the eight reliefs prayed for in encl 7 was allowed. Interestingly, two of the reliefs sought by the plaintiffs in encl 7 were as follows:

> 5. That pending the disposal of the suit herein, an injunction to *restrain the defendants* whether by itself, its directors, agents, servants, nominees or otherwise howsoever *from disrupting the day-to-day management and/or operations of the first plaintiff*, including but not limited to any steps taken to deprive the Company of the use of its bank accounts and/or monies.

6. An injunction be issued to *restrain the first defendant* whether by itself, its directors, agents, servants, nominees or otherwise howsoever, from dealing with, approaching, contacting and/or *entering into any contract* with the clients, suppliers, agents and/ or business partners of the first plaintiff, as listed and attached in Annexure A of this application; (Emphasis added.)

[135] The above reliefs in encl 7 were not allowed by Justice Darryl Goon. The two injunctive reliefs in particular prayer 5 was to restrain the defendants from disrupting the day-to-day management and/or operations of the first plaintiff, which is essentially what the plaintiffs are now claiming the defendants are trying to do to the plaintiffs by way of the applications.

[136] I am of the respectful view that the same rationale used in the granting of prayer 1 of encl 7 should be applied here, that is by allowing the Applications, the status quo at the time when the Writ was filed would be maintained in particular the status quo of the plaintiffs' position insofar as the Vietnam branch is concerned at that time. The issue of status quo must apply to all parties to this action.

[137] Thus, the balance of convenience would lie in the defendants' favour.

[138] Finally, the issue of whether damages are an adequate remedy. I agree with the defendants that damages would not be an adequate remedy in this case. This is because the harm that would befall the defendants are not of a kind which is capable of being quantified. Given the enormous amount of control the second plaintiff would have if the proposed resolutions are passed, it would not be feasible to reverse the steps that the second plaintiff would have taken in the Vietnam branch should the defendants succeed in their counterclaims.

[139] In this regard, I have also taken into account that based on the plaintiffs' own pleaded case if the share swap agreement is upheld then the plaintiffs would *not* have any interest in the Vietnam branch, the ownership of which would go to the defendants (60%) and Johnny Hoa (40%). This is another reason why the injunctions sought in the applications ought to be allowed to preserve the status quo.

CONCLUSION

[140] Without going into the merits, it is clear from the chronology of events that have transpired as stated in paras 29–48 above that there is an acrimonious conflict between the second plaintiff and the defendants and this includes the issue of calling for meetings between shareholders which could change the manner in which the first plaintiff is managed and controlled. Further, the

A defendants claim that the second plaintiff is refusing or deliberately avoiding a shareholders meeting. The second plaintiff has denied this.

[141] Under these circumstances, given that both the second plaintiff's case and the defendants' case centres upon a shareholders' dispute and the
B management and control of the first plaintiff, I see no reason why the interlocutory injunctions sought in the applications should not be granted to preserve the status quo to ensure that the integrity and substratum of this civil suit are not destroyed pending the trial and determination of this action.

C **[142]** Therefore, for the reasons stated above I allowed encls 116 and 121 with costs in the cause for both applications.

Applications allowed.

D Reported by Ashok Kumar

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